



# Proposal for an EU Directive on the award of concession contracts





# Scope of EU secondary public procurement legislation

|  |   |
|--|---|
| <p>Public contracts – works</p> <ul style="list-style-type: none"><li>→ how to publish</li><li>→ how to award</li><li>→ how to appeal</li></ul>  | <p>Concessions – works</p> <ul style="list-style-type: none"><li>→ how to publish</li><li>→ ?</li><li>→ how to appeal</li></ul> |
| <p>Public contracts-services</p> <ul style="list-style-type: none"><li>→ how to publish</li><li>→ how to award</li><li>→ how to appeal</li></ul> | <p>Concessions – services</p> <ul style="list-style-type: none"><li>→ ?</li><li>→ ?</li><li>→ ?</li></ul>                       |





## What is the proposal about?

- **Efficient spending of public money**
- **Improved access to (concessions) market**
- **Facilitating PPPs (mobilisation of private capital) leading to improved investment opportunities & innovation**





What is the proposal **NOT** about:

- **Privatisation of services**
- **Forced externalisation of public tasks**
- **Setting quality standards for the provision of services (for example water distribution)**
- **Conditions of access to an economic activity**





# Preparatory works

- Study by PWC: « Study in the Field of Public Private Partnerships » of January 2007
- Study by CSES: « Analysis of Sectors concerned by Service Concessions » of December 2009
- Study by the College of Europe « Identification of sources of information on services concessions and analysis of identified calls for tenders » of May 2010
- Public online consultation (12th May – 9th July 2010)
- Targeted stakeholders consultation (5th August – 30th September 2010)





# Some information from public consultations

- **41%** of respondents declared existence of **entry barriers** to the market due to the fragmented national frameworks on concessions
- **37,3%** of the respondents are aware of concession contracts being awarded without any publication or transparency
- **44%** of the business community declared being aware of **direct awards** of concession contracts
- **32,4%** of the respondents considered that diverging rules and practices regarding concessions constituted an **obstacle to the cross-border** award of the contracts
- **61,6%** of the respondents considered that publication of the concessions notice in OJEU would **increase transparency**





## Impact Assessment Report revealed the following distortions:

- **Lack of legal certainty** (with regard to the definition and award of concessions)
- **Existence of entry barriers** (stemming from the disparity of national rules and unlawful practices of contracting authorities/entities)
- **Insufficient legal protection of tenderers** (not available for services concessioners)





# Options considered

- **Basic rules** – (definition of concession, publication in the OJ, deadline for applications, remedies)
- **Detailed rules** – as applicable to public contracts (with technical adjustments)
- **Mixed rules** – (basic rules + procedural guarantees, technical specifications, selection and exclusion criteria, adjusted award criteria, *ex post* transparency, rules on public-public, modifications).







## Who will benefit?

- **Contracting authorities/entities** – legal certainty, sound financial management (82% of respondents)
- **Users** – better value for money & innovative services (72% of respondents)
- **Businesses** – better access to information, level playing ground, legal certainty (83% of respondents)





# Approach

- Single «rulebook» for concessions
- Based on Court's case law
- One set of rules for both classic and utilities sector
- Flexibility





# Scope of the instrument

- **Threshold of 5 million € for all concessions** (works, services, classic + utilities)
- **Exemption of public-public cooperation**
- **Exemption of:**
  - **concessions regulated by sectoral provisions** (public passenger transport Reg. (EC) 1370/2007; air transport Reg. (EC) 1008/2008),
  - **certain concessions awarded to contracting entities on the basis of an exclusive right**
- **Lighter regime for social services** (no compulsory publication of *ad hoc* concession notice)





# Contents – main elements (I)

- **Definition of concessions**

- **Clearer distinction between concessions and public contracts:**

- reference to and definition of the transfer of substantial operating risk (no guarantee to break even on investments and costs incurred)
- definition of operating risk (demand and availability risk)

- **Clearer distinction between concessions and authorisations & licences**





## Contents – main elements (II)

- **Publication of notices in the OJEU (*ex post* & *ex ante*)**
- **Duration of concessions proportionate to investments made**
- **Rules on modification of contracts**





## Contents – main elements (III)

- **Procedural guarantees**
- **General requirements on criteria of selection & exclusion of candidates**
- **Extension of Remedies Directives to service concessions and concessions in the utilities sector**





## Contents – main elements (IV)

- **General requirements on award criteria**
  - **Option to use economically most advantageous tender (MEAT) or award criteria, meeting only general requirements**
  - **General requirements:**
    - objective
    - linked to the subject matter of the concession,
    - no unrestricted freedom of the contracting authority
  - However:**
    - may encompass references to experience of the tenderers, financial soundness as well as to certain policies (personnel, environment) or internal organisation of the undertaking





# More flexible approach (I)

- **No rules on:**

- mandatory procedures
- contracts awarded by concessionnaires (as is the case today)
- quotas on sub-contracting
- other aspects, such as « apply or explain » obligation on division of contracts into lots, labels, occasional joint procurement etc.







## More flexible approach (II)

- **Flexibility on:**
  - selection criteria
  - exclusion criteria
  - award criteria
- **Possibility of delayed phasing-in of compulsory e-procurement** (5 years instead of 2 years for public contracts)
- **Lighter rules on conflicts of interest**





## In a nutshell, the proposal:

- Addresses problems of insufficient access to the market and inadequate legal certainty
- Is applicable only when public authorities decide to confer their tasks to the third party
- Essentially, obliges to publish a notice and to ensure fairness of procedures designed by contracting authorities in line with enumerated guarantees
- Puts all the bidders on equal footing
- Ensures accountability for spending of public money

